Supreme Court, U.S.
FILED

03 674 NOV 4 2003

OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN B. LUNSETH
Counsel of Record
JEFFREY J. KEYES
KEVIN M. MAGNUSON
JULIE H. FIRESTONE
ADAM C. MORRIS
Briggs and Morgan, P.A.
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

MICHELLE GARNET-MCKENZIE
Minn. Advocates for Human Rights
310 Fourth Avenue South, Suite 1000
Minneapolis, MN 55415
(612) 341-3302

Counsel for Petitioner

QUESTION PRESENTED

Whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal.

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

On March 1, 2003 the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the Bureau of Immigration and Customs Enforcement in the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002 §§ 2, 101, 441, 442, 6 U.S.C.A §§ 101, 111, 251, 252 (West Supp. 2003).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE PETITION 8

I. THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS ARE IN DIRECT CONFLICT 8

II. THE EIGHTH CIRCUIT'S OPINION STANDS ALONE 9

III. THE ACCEPTANCE REQUIREMENT IS A MATTER OF NATIONAL IMPORTANCE 12

IV. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE REMOVAL STATUTE IS ERRONEOUS 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Ali v. Ashcroft, — F.3d —, 2003 WL 22137018 (9th Cir. Sept. 17, 2003) ..... *passim*

Ali v. Ashcroft, 213 F.R.D. 390 (W.D. Wash. 2003) ..... *passim*

Amanullah & Wahidullah v. Cobb, 862 F.2d 362 (1st Cir. 1988) 4, 10

In re Anunciacion, 12 I. & N. Dec. 815 (BIA 1968) 11

Bragdon v. Abbott, 524 U.S. 624 (1998) 11

Chi Sheng Liu v. Holton, 297 F.2d 740 (9th Cir. 1961) 4, 10

Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) 18

Lee Wei Fang v. Kennedy, 317 F.2d 180 (D.C. Cir.), *cert. denied*, 375 U.S. 833 (1963) 4, 10

In re Linnas, 19 I. & N. Dec. 302 (BIA 1985) 11

In re Niesel, 10 I. & N. Dec. 57 (BIA 1962) 11

Pelish v. I.N.S., 329 F.3d 1057 (9th Cir. 2003) 4, 10

Rogers v. Lu, 262 F.2d 471 (D.C. Cir. 1958) 4, 10

United States ex rel. Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959) 4, 9-10

STATUTES

8 U.S.C. § 1231(b) (2000) ..... *passim*

Homeland Security Act of 2002 §§ 2, 101, 441, 442, 6 U.S.C.A. §§ 101, 111, 251, 252 (West Supp. 2003) ii

Immigration and Naturalization Act, 8 U.S.C. § 1253(a) 6, 7

8 U.S.C. § 1227(a)(2) 10

OTHER AUTHORITIES

8 C.F.R. § 241 17

1967 Protocol Relation to the Status of Refugees, 606 U.N.T.S. 267 18

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 18

DHS Operating Instructions 243.1, *available at* http://www.immigration.gov 16-17

Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649 (May 11, 1998) 6-7

Extension of the Designation of Somalia Under the Temporary Protected Status Program, 67 Fed. Reg. 48,950 (July 26, 2002) 12-13, 17

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 18

The Immigration and Naturalization Systems of the United States, Report of the Committee on the Judiciary of the Senate (1950) 16

PETITION FOR WRIT OF CERTIORARI

Petitioner Keyse G. Jama petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is reported at 329 F.3d 630. The Magistrate Judge's Report and Recommendation (Pet. App. 21a) is unreported. The District Court's Final Order (Pet. App. 42a) is unreported. The order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (Pet. App. 56a) is unreported. The order of the Eighth Circuit denying the motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari (Pet. App. 57a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on May 27, 2003. A timely petition for rehearing and for rehearing en banc was denied on August 6, 2003. A timely motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari was denied on August 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the removal statute, 8 U.S.C. § 1231(b)(2), provides:

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into that country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

STATEMENT OF THE CASE

In holding that 8 U.S.C. § 1231(b) authorizes the government to remove (deport) a person from the United

States without first establishing that the country in question would accept his or her return, the Eighth Circuit acknowledged that it was splitting from nearly a half-century of judicial authority: "[Petitioner] cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them . . . ." Pet. App. 6a.

Just four months after the Eighth Circuit's decision, the Ninth Circuit unequivocally confirmed the existence of this split in *Ali v. Ashcroft*, — F.3d —, 2003 WL 22137018 (9th Cir. Sept. 17, 2003):

> Requiring acceptance before removal is consistent with all of the case law that has touched on the question. The one exception is the Eighth Circuit's decision in *Jama* . . . . We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is "no settled judicial construction of the provision in question."

Id. at *7, *aff'g Ali v. Ashcroft*, 213 F.R.D. 390 (W.D. Wash. 2003). Indeed, the First, Second, Ninth, and D.C. Circuit Courts of Appeals have all interpreted the relevant statutory language to require acceptance by the destination country before removal may be effected. *See Tom Man*, 264 F.2d at 928; *Chi Sheng Liu v. Holton*, 297 F.2d 740, 743 (9th Cir. 1961); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 185 (D.C. Cir.), *cert. denied*, 375 U.S. 833 (1963); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958); *see also Pelish v. I.N.S.*, 329 F.3d 1057, 1061 (9th Cir. 2003); *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988). The Eighth Circuit opinion thus creates a split between the decisions of the United States Courts of Appeals on the same important question of law. The Eighth Circuit decision conflicts with the statutory language and legislative history and is

inconsistent with the United States' own rules and regulations, and with international law. The resulting split in the courts of appeals creates the undesirable situation in which the Attorney General applies one interpretation of the federal statute, which requires acceptance prior to removal, in the Eighth Circuit and the opposite interpretation in other jurisdictions in the United States.

1. Petitioner was born in Somalia in 1979. Pet. App. 43a. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, Petitioner and his family applied for admission to the United States as refugees. Their application was granted and Petitioner arrived in the United States in February 1996. Petitioner later settled in Minnesota, where he worked and attended school. He never became a United States citizen or permanent resident alien, but rather retained his refugee status. *Id.*

In June 1999, Petitioner fought with another Somali man, and in September 1999, Petitioner pled guilty to third degree assault, a felony under Minnesota law. Pet. App. 44a. As a result of Petitioner's felony conviction, the INS initiated removal proceedings against Petitioner and he was taken into INS custody in June 2000 upon completion of his prison sentence. *Id.* An Immigration Judge found Petitioner removable from the United States based upon his criminal conviction. The INS sought to remove Petitioner to Somalia as the country in which he was born, pursuant to 8 U.S.C. § 1231(b)(2)(E)(iv).

2. Somalia has been without a central government since the ouster of dictator Siad Barre in 1991. *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash. 2003). Over the last decade, warring factions have controlled fiefdoms in various regions of the country, and a state of general chaos persists. *Id.* The United States has no diplomatic relations with Somalia, maintains no embassy in Somalia, and has no consular

relations with a government in Somalia. *See* Resp't Return Exs. Vol. ("Ex. Vol.") at 203 & 216. Because no functioning government exists in Somalia, Petitioner does not have, nor could he receive, a passport or other internationally recognized documents establishing him as a former resident or citizen of Somalia.

3. Before the intervention of the district court, INS agents planned to remove Petitioner to Somalia without any acceptance or repatriation by a government. *See* Joint Appendix ("J.A.") at 78; Ex. Vol. at 239, 243. The INS agents would not have accompanied Petitioner into Somalia, presumably because no government has accepted his repatriation and because travel there is too dangerous. Ex. Vol. at 238-39, 243. Instead, the INS planned to accompany Petitioner as far as Dubai in the United Arab Emirates, then to place Petitioner on a flight into Somalia. During the time in question, news services were reporting people being killed "at the very airport where the INS seeks to drop [him]." Pet. App. 26a (quotation omitted). When Petitioner landed in Somalia, he would become a stateless person with no travel documents or identity papers in a war-torn region with no central government.

4. For nearly fifty years, the removal statute 8 U.S.C. § 1231(b) and its virtually identical predecessor, section 243(a) of the Immigration and Naturalization Act ("I.N.A."), 8 U.S.C. § 1253(a), have been interpreted as requiring acceptance by the government of the country designated as the place for deportation. As a result, it is not unusual for deportees to remain in the United States, sometimes for long periods of time, until such acceptance can be achieved. There have been, for example, thousands of deportees in the United States whom, over the years, the INS has not deported to countries such as China, Vietnam, Cambodia, and Cuba. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 (May 11, 1998) (noting that most aliens in

extended INS detention come from countries that do not have diplomatic relations with the U.S. and no country will accept them); *see also* J.A. at 81-86.

5. After the INS issued a warrant of removal notifying Petitioner of its intent to deport him, Petitioner filed a petition for a writ of habeas corpus to prevent removal until the acceptance conditions of the governing statute were satisfied. Pet. App. 13a. Petitioner argued that under 8 U.S.C. § 1231(b)(2) the INS could not remove him to Somalia without first establishing that Somalia would accept his return. Pet. App. 45a.

6. The United States District Court for the District of Minnesota (Tunheim, J.), adopting the Report and Recommendation of the Magistrate Judge (Pet. App. 21a), granted habeas relief in favor of Petitioner. The district court found that the government's interpretation of step three of 8 U.S.C. § 1231(b)(2) would have rendered step two, which explicitly requires acceptance by a country of which the alien is a "subject, national, or citizen," meaningless. Pet. App. 51a. Therefore, the court adopted a construction of the statute which gave effect to all of its provisions and held that the acceptance requirement was meant to apply to all of the clauses listed in step three of the removal statute, § 1231(b)(2)(E). *Id.*

The district court relied upon previous court decisions, including decisions from the Second and District of Columbia Circuit Courts of Appeals, which had interpreted 8 U.S.C. § 1253(a), the statutory predecessor to § 1231(b)(2), and held that acceptance from the removal country was required at § 1231(b)(2)(E). *Id.* The district court found that the previous and current statutes were essentially identical and thus the previous holdings of the courts of appeals remained in force:

> The Court has carefully reviewed both statutes but finds no meaningful distinction between the two

> statutes. Aside from the introduction of subheadings into the statute's text, the language in the old statute, as the government itself concedes, contains the same or similar language that is found in § 1231(b)(2). Accordingly, the holdings in *Tom Man* and similar cases are on all fours with the interpretation of the statute in this case.

Id. at 52a.

7. The INS appealed and a divided panel of the Eighth Circuit reversed. Pet. App. 1a. The majority held that, because Congress explicitly inserted an acceptance requirement into steps one and two of the removal statute, the absence of an explicit acceptance requirement in all the individual clauses of step three but the final clause indicated that acceptance by the removal country was not required. *Id.* at 6a. In so holding, the majority rejected previous decisions of various courts of appeals, stating, "[w]e are not bound by these decisions; indeed, we are not persuaded by them . . . ." *Id.*

The Eighth Circuit recognized that its interpretation would lead to the anomalous result in which a country could refuse to accept one of its subjects, nationals, or citizens for removal under step two and the government could then forcibly remove the alien to that same country as an "additional country" under step three. The Eighth Circuit majority rationalized this result by stating that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

I. THE RECENT DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS ARE IN DIRECT CONFLICT.

"For nearly a half century, the courts have held the

United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien." Pet. App. 9a (Bye, J., Dissenting) (collecting cases). In ruling that step three of the removal statute, 8 U.S.C. § 1231(b)(2)(E), does not require acceptance by the removal country, the Eighth Circuit explicitly rejected this authority. *Id.* at 6a.

Indeed, just four months after the Eighth Circuit's decision, the Ninth Circuit again reaffirmed the acceptance requirement in *Ali v. Ashcroft*, — F.3d —, 2003 WL 22137018 (9th Cir. Sept. 17, 2003). The Ninth Circuit held that while acceptance is explicitly required in steps one and two, a careful reading of the statute demonstrates that acceptance is also implicitly required for all removals in step three. *Id.* at *6.

Further, the Ninth Circuit explicitly recognized its conflict with the Eighth Circuit: "We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is 'no settled judicial construction of the provision in question.'" *Id.* at *7 (quoting Pet. App. 7a).

II. THE EIGHTH CIRCUIT'S OPINION STANDS ALONE.

1. With the exception of the Eighth Circuit's decision, federal courts have consistently interpreted the seven subsections of § 1231(b)(2)(E), and its predecessor, 8 U.S.C. § 1253(a), to require acceptance for each of the "additional removal countries." *See Ali*, — F.3d —, 2003 WL 22137018, at *7 ("Requiring acceptance before removal is consistent with all of the case law that has touched on the question"); *see also* Pet. App. 52a ("in fifty pages of briefing, the government '*has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him.*'") (quoting Pet. App. 38a). For example, Judge Learned Hand of the Second Circuit concluded that "we think that

deportation under any of these is subject to the condition expressed in the seventh subdivision: *i.e.* that the 'country' shall be 'willing to accept' him into its territory." *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959). *Accord Chi Sheng Liu v. Holton*, 297 F.2d 740, 743 (9th Cir. 1961) (following *Tom Man* and stating that former § 1253(a) "provides that an alien cannot be deported to any country unless its government is 'willing to accept him into its territory'"); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 185 (D.C. Cir.), *cert. denied*, 375 U.S. 833 (1963) ("It must be remembered . . . that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. It must be carried out through arrangements made with the foreign government.") (quotation omitted); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958) (preceding *Tom Man* and affirming that the Attorney General may not deport the plaintiff to China "until and unless" the government indicates its willingness to accept the plaintiff); *see also Pelish v. I.N.S.*, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that an alien "can be deported to the country of his birth or to a country where he resided prior to entering the United States (assuming these countries would take him)"); *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988) (interpreting 8 U.S.C. § 1227(a)(2) to require a country to accept an alien prior to deportation based on the settled construction of the parallel provision in § 1231(b)(2)).

2. Because the current and previous statutes are essentially identical, these decisions remain in full force and effect.

> Former § 1253(a) is essentially identical to § 1231, providing the same three-step process, explicitly requiring acceptance in the first two steps and then, in the third step, listing the six additional countries and stating in the seventh clause that the Attorney General may deport the alien to "any country which is willing to accept such alien into its territory."

Ali, — F.3d —, 2003 WL 22137018, at *7. *See also Ali v. Ashcroft*, 213 F.R.D. at 403 ("A review of the text of the statute prior to and since the amendments shows that the two versions are substantially indistinguishable."); Pet. App. 52a ("The Court has carefully reviewed both statutes but finds no meaningful distinction between the two statutes.").

3. The Board of Immigration Appeals ("BIA") also has consistently interpreted § 1232(b)(2) to require acceptance by the designated country under all three steps of the country selection process. *See In re Linnas*, 19 I. & N. Dec. 302, 307 (BIA 1985) (concluding that the language of the statute "expressly requires, or has been construed to require that the government of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory'"); *see also In re Anunciacion*, 12 I. & N. Dec. 815, 818 (BIA 1968) (stating that the designated country must accept the deportee under all three steps of the statute); *cf. In re Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962) (holding that a *preliminary* inquiry by the immigration judge at the time of country designation is not required).

4. Moreover, Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990 and 1996 without making material changes to the removal statute. The fact that Congress declined to make substantive changes in the face of a clear line of precedent reveals that Congress intended the statute to be interpreted as it consistently had been, requiring acceptance from the removal country for each of the three steps. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); Pet. App. 10a ("Each time Congress amended the INA or re-enacted the statutory provisions which now appear at § 1231(b)(2) without making

any material changes to the precursor statute, it adopted the well-settled construction given the precursor by the courts and the INS.") (Bye, J., dissenting).

III. THE ACCEPTANCE REQUIREMENT IS A MATTER OF NATIONAL IMPORTANCE

1. The present matter is of national importance and implicates fundamental issues of human rights. As recognized by the dissent in *Jama*, without an acceptance requirement, "we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords." Pet. App. 12a (Bye, J., dissenting). Regarding Somalia, "[t]he Government's own submissions . . . ha[ve] shown that Somalia is a country in chaos, engaged in clan warfare with rival groups clashing over turf and control, with no government and no diplomatic relations with the United States. There is no official entity that might provide even the most basic of administrative protections upon their [the aliens'] arrival." *Ali v. Ashcroft*, 213 F.R.D. at 400.

The government confirms that deportation to Somalia implicates fundamental human rights concerns:

> There is an ongoing armed conflict within Somalia and, due to such conflict, requiring the return of aliens who are nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) would pose a serious threat to their personal safety . . . . Furthermore, there exist extraordinary and temporary conditions in Somalia that prevent nationals of Somalia (and aliens having no nationality who last habitually resided in Somalia) from returning home in safety . . . . Finally, permitting nationals of Somalia to remain temporarily in the United States is not contrary to the national interest of the United States.

Temporary Protected Status Program, 67 Fed. Reg. 48,950 (July 26, 2002).

2. Due to its conflict with other courts of appeals, the Eighth Circuit's decision will cause disparate results in deportation proceedings, an area of national importance where uniformity should govern, and will extend beyond Somali deportees. The practical effect of the *Jama* decision is that deportation will depend upon the circuit in which the person to be removed is held. If, for example, an alien subject to removal is located in New York City or Seattle, then he could not be removed to a country like Somalia because the *Tom Man* and *Ali* decisions would bar removal until acceptance could be obtained. If, on the other hand, the alien to be removed is located in Minneapolis, the government could utilize the Eighth Circuit's view of the removal statute. The net result of the split between the circuits would be sharply different treatment of identically situated aliens based solely on the location in which they are detained.

IV. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE REMOVAL STATUTE IS ERRONEOUS.

1. The removal statute establishes a three-step process for determining a removable alien's destination country. In the first step, the alien may designate a country of removal, subject to certain limitations. § 1231(b)(2)(A). The Attorney General may disregard the alien's designation under four specified circumstances, including if, "the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country," or if "the government of the country is not willing to accept the alien into the country." § 1231(b)(2)(C)(ii) & (iii). Petitioner did not make a timely designation under this section, so the first step does not apply.

If the first step has failed to result in a country of removal, then in the second step, the Attorney General is

removal, then in the second step; the Attorney General is directed to "remove the alien to a country of which the alien is a subject, national, or citizen," unless the country is unwilling to accept the alien or fails to indicate (upon an inquiry by the Attorney General) that it will accept the alien. § 1231(b)(2)(D). Because the "government of the country" of which Petitioner is a "citizen" has failed to accept him, step two does not result in a country of removal for Petitioner.

Therefore, it is undisputed that Petitioner's removal must be determined at step three. Pet. App. 5a. Step three then designates additional removal countries should the Attorney General be unsuccessful in removing the alien at steps one and two:

> **(E) Additional removal countries**
>
> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> **(i)** The country from which the alien was admitted to the United States.
>
> **(ii)** The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> **(iii)** A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> **(iv)** The country in which the alien was born.
>
> **(v)** The Country that had sovereignty over the alien's birthplace when the alien was born.
>
> **(vi)** The country in which the alien's birthplace is located when the alien is ordered removed.
>
> **(vii)** If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E) (2000).

2. As the Ninth Circuit recognized, reading § 1231(b)(2)(E)(i)-(vi) not to require acceptance would render § 1231(b)(2)(C) and (D) superfluous because, in many instances, the applicable countries would be the same:

> [I]n a situation where a government has actually denied acceptance of a removable person, a person could be airdropped surreptitiously into that same country if it met the requirements of one of the sub-parts . . . . The only logical interpretation of the plain meaning that gives effect to all sections of the statute is one that requires government acceptance from "additional" countries listed in § 1231(b)(2)(E)(i)-(vi).

Ali, — F.3d —, 2003 WL 22137018, at *6.

Similarly, "the plain language of the statute indicates that the option to remove a person to the country in which he or she was born only exists where that country is different from the countries in steps 1 and 2." *Id.* If, for example, "the country designated by the alien was the same as his birth country, the anomalous situation could occur where the country designated by the alien in step one refuses to accept the alien yet the INS could still remove the alien to that very same country under step three." *Id.* The Court concluded that "the INS should not be allowed to thwart [the acceptance requirement of step one and step two] by skipping to step 3." *Id.*

3. The legislative history of the statutory provision further establishes that acceptance is required for removal. The removal statute, 8 U.S.C. § 1231(b), was originally enacted in 1952. *Ali v. Ashcroft*, 213 F.R.D. at 403. Even in light of Cold War national security concerns, the government

recognized that it could not deport persons absent acceptance:

> One of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported . . . . The nature of the problem was described by Immigration and Naturalization Service in its 1948 report: "Following an order of deportation a passport or other travel document must be procured for the alien in order for him to enter the country to which he is to be deported . . . . If [the INS or State Department] is unsuccessful in such requests [for travel documents], the alien cannot be deported."

Ali v. Ashcroft, 213 F.R.D. at 404 (quoting *The Immigration and Naturalization Systems of the United States*, Report of the Committee on the Judiciary of the Senate 637-38 (1950) ("Senate Report")).

Congress considered several options to address this problem, including detention, orders of supervision, and "authorizing the Attorney General, within his discretion, to deport an alien to any country which would accept him into its territory." Senate Report at 638. Thus, the legislative history indicates that Congress, in adding "additional countries of removal" to § 1231(b) and its predecessor, was attempting to provide the executive branch options in case acceptance was not obtained from a person's designated country. *Ali v. Ashcroft*, 213 F.R.D. at 403. There is no support for the argument that Congress intended to eliminate the need for acceptance from the receiving country. *Id.*

4. The government's own operating instructions and regulations confirm the acceptance requirement. DHS Operating Instruction 243.1(c)(1) states that "deportation cannot be effected until travel documentation has been obtained." DHS Operating Instructions 243.1, *available at*

WL 22137018, at *9. If the country designated by the alien is unlikely to receive him, a simultaneous request for travel documents is to be made "to the authorities of the country to which he is likely to be deported." *Id.* Travel documents represent internationally-recognized documentation, such as a passport. The government admits that official travel documents cannot be obtained from Somalia. *See* Resp't Appeal Br. at 10.

Applicable federal regulations reinforce Petitioner's interpretation. 8 C.F.R. § 241.4(k)(1) provides for a "custody review . . . where the alien's removal, while proper, cannot be accomplished during the removal period because no country currently will accept the alien." *Ali*, — F.3d —, 2003 WL 22137018, at *9. And 8 C.F.R. § 241.5(c)(1) authorizes issuance of employment authorization to an alien released from custody if the "[t]he alien cannot be removed because no country will accept the alien."

Finally, 8 U.S.C. § 1231(a)(7) provides:

> [N]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that . . . the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.

Thus, the Eighth Circuit's opinion is wholly inconsistent with the United States' own laws, rules, and regulations.

5. The acceptance requirement is also consistent with the rule of statutory construction that, where possible, a statute will be construed in a manner that avoids violating international law. *Ali*, — F.3d —, 2003 WL 22137018, at *10. As the Ninth Circuit recognized in *Ali*, "the government still does not challenge the assertion that Petitioners would be subject to human rights abuses if removed to Somalia." *Id.*

Indeed, removing persons to Somalia "would subject them to human rights abuses in violation of customary international law and provisions of three multilateral treaties to which the United States is a signatory." *Id.* at *9 (quotation omitted) (referring to the 1967 Protocol Relation to the Status of Refugees, 606 U.N.T.S. 267; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, SER at 157-62) (quotation omitted)).

Accordingly, the Eighth Circuit's reading of the removal statute unnecessarily creates an interpretation that is inconsistent with international law. Such a reading conflicts with well-settled rules of statutory interpretation. "Although Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations." *Id.* at *10 (quoting *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

JOHN B. LUNSETH
Counsel of Record
JEFFREY J. KEYES
KEVIN M. MAGNUSON
JULIE H. FIRESTONE
ADAM C. MORRIS

MICHELLE GARNET-MCKENZIE

Minn. Advocates for Human Rights
310 Fourth Avenue South, Ste. 1000
Minneapolis, MN 55415
(612) 341-3302

Briggs and Morgan, P.A.
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Counsel for Petitioner

November 3, 2003

APPENDICES

APPENDIX

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

No. 02-2324

United States Court Of Appeals
for the Eighth Circuit

Submitted: February 12, 2003

Filed: May 27, 2003

*631 Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

More than three years after he entered the United States, Somalian refugee Keyse Jama pleaded guilty to third degree assault in Minnesota state court. As a result of this felony conviction, the Immigration and Naturalization Service (INS)[1] initiated removal proceedings against Mr. Jama as an alien who had been convicted of "a crime involving moral turpitude." *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Mr. Jama conceded his removability, and the immigration judge rejected his applications for humanitarian relief. The Board of Immigration Appeals (BIA) affirmed the immigration

---

[1] On March 1, 2003, after the parties argued this case but before this opinion was filed, the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002); 79 Interpreter Releases 1777, 1777 (2002). For ease of reference and because of the status of the agency at the time this case was submitted, this opinion will refer to the agency as the INS.

judge's decision. After the INS issued a warrant of removal to Mr. Jama, *see* 8 C.F.R. § 241.32, he filed a petition for a writ of habeas corpus to prevent the execution of his removal order, *see* 28 U.S.C. § 2241. In that petition, Mr. Jama argued that under 8 U.S.C. § 1231(b)(2), the INS could not remove him to Somalia without first establishing that Somalia would accept his return.

The district court granted habeas relief in favor of Mr. Jama, and the INS appeals that decision. We believe that the district court correctly concluded that it had jurisdiction to consider Mr. Jama's habeas peti- ***632** tion, but we reverse the district court's order granting the writ.

I.

The INS seeks review of the district court's conclusion that it had jurisdiction under 28 U.S.C. § 2241 to consider Mr. Jama's habeas petition. Relying on general principles of procedural default and waiver, the INS first argues that Mr. Jama should have challenged the INS's decision to remove him to Somalia by bringing a timely petition for review in this court following the administrative proceedings that resulted in his final order of removal to Somalia. *See* 8 U.S.C. § 1252(a)(1), (b)(1), (b)(2), (b)(9); 28 U.S.C. §§ 2341-2349. But as both parties recognize, Congress has directed that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime of moral turpitude. *See* 8 U.S.C. §§ 1252(a)(2)(C), 1182(a)(2)(A)(i)(I).

Although it is true that we retain "direct review" jurisdiction to determine whether an alien's criminal conviction is indeed the type of offense that subjects him to removal, as well as to consider substantial constitutional challenges to the Immigration and Nationality Act (INA), neither of these exceptions applies in Mr. Jama's case. *See, e.g.*, *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 695-96 (8th Cir. 2002). Mr. Jama has long since conceded that his

criminal conviction renders him removable. Mr. Jama does not, as the INS suggests, raise a substantial constitutional challenge to the INA. Mr. Jama's challenge is one of statutory construction, notwithstanding his fleeting (and we think unavailing) references to the procedural and substantive due process implications of removing him to a country that has not agreed to accept him.

The INS also contends that the district court lacked jurisdiction over Mr. Jama's habeas petition because it constitutes a challenge to the execution of a removal order prohibited by 8 U.S.C. § 1252(g). That statute provides in relevant part that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to . . . execute removal orders." 8 U.S.C. § 1252(g). Mr. Jama, however, is not objecting to an unfavorable discretionary decision or action to execute the removal order. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-85, 487 (1999). He challenges, rather, the Attorney General's construction of a statute; specifically, the Attorney General's legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return. Our role here (and the role of the district court below) is not to second-guess the Attorney General's exercise of his discretion; it is to address a purely legal question of statutory construction. *Cf. Demore v. Kim*, No. 01-1491, 2003 WL 1960607, at *5 (U.S. April 29, 2003). We believe, therefore, that Mr. Jama's question is simply outside the scope of the jurisdiction-stripping provision of § 1252(g).

We note, moreover, that permitting Mr. Jama to proceed with his habeas petition is entirely consistent with the principles set forth in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), *Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001), and *Demore*, 2003 WL 1960607, at *5. Although those cases did not address § 1252(g), we believe that they are pertinent

to the jurisdictional issue at hand. Absent a "clear, unambiguous, and express statement of congressional intent" to the ***633** contrary, we have no reason to assume that Congress intended to preclude the district court's habeas review of a pure question of law such as the one presented by Mr. Jama. *See St. Cyr*, 533 U.S. at 298-99, 314. We note further that construing § 1252(g) to eliminate "review of a pure question of law by any court would give rise to substantial constitutional questions." *See id.* at 300, 305; U.S. Const. Art. I, § 9, cl. 2.

II.

The INS also asserts that the district court misconstrued 8 U.S.C. § 1231(b)(2) when it concluded that that statute requires the INS to establish that Somalia will accept Mr. Jama's return prior to removing him to that country. We agree. Before we turn to the merits of the INS's argument, we review briefly the statute at issue here.

Section 1231(b)(2) sets forth a progressive, three-step process for determining a removable alien's destination country. The statute first permits the alien to select a country of removal, subject to certain limitations if the country designated is one that is contiguous or adjacent to the United States. 8 U.S.C. § 1231(b)(2)(A)-(B). The Attorney General may disregard the alien's designation under four specified circumstances; for example, if the designated country is unwilling to accept the alien. 8 U.S.C. § 1231(b)(2)(C), (b)(2)(C)(iii). In the second step, assuming the alien has failed to select a country or cannot be removed to his designated country under step one, the Attorney General is directed to "remove the alien to a country of which the alien is a subject, national, or citizen" unless the country is unwilling to accept the alien or fails to indicate (upon an inquiry by the Attorney General) that it will accept the alien. 8 U.S.C. § 1231(b)(2)(D).

If the alien is not removed to a country where he is a subject, national, or citizen, then the Attorney General must proceed to the third step of the process. That step entails selecting a destination country from a list of statutory "[a]dditional removal countries," as follows:

> (i) The country from which the alien was admitted to the United States.
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> (iv) The country in which the alien was born.
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
>
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.
>
> (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E)(i)-(vii). In this case, the parties agree that Mr. Jama's removal destination must be determined at the third step of the process, and it is to this step that we now turn.

The INS seeks to remove Mr. Jama to Somalia because it is "[t]he country in which [Mr. Jama] was born." 8 U.S.C. § 1231(b)(2)(E)(iv). The parties disagree, however, on whether the statute requires the INS to establish that Somalia will accept Mr. Jama's return prior to effecting his removal.

This disagreement is signifi- ***634** cant; if prior acceptance is required, the INS will be unable to return Mr. Jama to Somalia. This is because Somalia lacks a functioning central government, rendering it impossible for the INS to obtain Somalia's prior acceptance.

Mr. Jama cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them because they disregard the plain language of the statute itself, which is the "starting point in any question of statutory interpretation." *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002). Our careful review of the statute reveals that, as matter of simple statutory syntax and geometry, the acceptance requirement is confined to clause (vii), and does not apply to clauses (i) through (vi).

This statute well illustrates the maxim "*expressio unius est exclusio alterius*," or "expression of the one is the exclusion of the other." Congress inserted an acceptance requirement into steps one and two, and into the self-contained provisions that appear in clause (vii) of step three. Congress did not insert an acceptance requirement into the self-contained provisions that appear in clauses (i) through (vi). "Courts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit." *Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000). In other words, we believe that the "short answer" to Mr. Jama's assertion (that the INS must obtain prior acceptance before returning him to the country of his birth) is that "Congress did not write the statute that way." *See United States v. Naftilin*, 441 U.S. 768, 773 (1979). Whether it is politically wise, efficient, or considerate of the United States to remove an alien without the prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province.

Mr. Jama contends that this interpretation of step three nullifies the preceding provisions of the statute. We disagree. We reject, for example, Mr. Jama's suggestion that our plain reading of the statute, which permits the INS to return an alien to his country of birth without prior acceptance, wholly eviscerates the need to obtain a destination country's acceptance before returning its "subject, national or citizen." *See* 8 U.S.C. § 1231(b)(2)(D), (2)(E)(iv). An alien is not always a subject, national or citizen of the country in which he was born. We note, moreover, that between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused.

We also reject Mr. Jama's suggestion that, in the absence of any material difference between § 1231(b)(2) and its predecessor statute, 8 U.S.C. § 1253(a) (1994), this court must presume that Congress meant to incorporate and adopt the (as Mr. Jama sees it) "settled judicial construction" that reads the prior acceptance requirement into all clauses of the statute. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). Whether or not this presumption applies only to decisions by the United States Supreme Court or includes all judicial and administrative constructions of the statute is immaterial. *See Keene Corp v. United States*, 508 U.S. 200, 212 (1993); *Shapiro v. United States*, 335 U.S. 1, 16 (1947); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Under either standard, there exists no settled ***635** judicial construction of the provision in question. *See United States v. Powell*, 379 U.S. 48, 55 n.13 (1964); *Compare Tom Man*, 264 F.2d at 928 (prior acceptance required), *with In re Niesel*, 10 I.&N. Dec. 57, 59, 1962 WL 12904 (BIA 1962) (no prior acceptance required).

The dissenting opinion takes the view that *Niesel* addresses only the issue of an initial inquiry into whether a country will accept an alien, and thus does not bear on a country's final agreement to accept an alien. Our reading of

Niesel, however, convinces us that no such distinction exists in that case or under the statute. *Niesel* recognizes that certain portions of the statute (steps one and two, and clause (vii) of step three) require the INS's "preliminary inquiry" as to whether a country is willing to accept an alien prior to ordering the alien deported to that country, and that under the remaining portions of the statute, no such preliminary inquiry is required. *Niesel*, 10 I.&N. at 59. It does not follow from this that there exists some sort of statutorily-required "final inquiry" that applies to the deportation of every alien under every portion of the statute.

We note, moreover, that contrary to what the dissenting opinion suggests, the BIA did not abandon *Niesel's* holding in *In re Linnas*, 19 I.&N. Dec. 302, 1985 WL 56051 (BIA 1985). That case arose in New York, and the BIA, citing *Tom Man*, noted that "the language of [the statute] expressly requires, or has been *construed* to require, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'" *Linnas*, 19 I.&N. at 307 (emphasis added).

Finally, we note the dissenting opinion's reluctance to apply the words of the statute because to do so would not "accord with [the dissenting judge's] sense of liberty and justice." But it was Learned Hand himself who noted that it would be "most irksome to be ruled by a bevy of Platonic Guardians," even if he knew "how to choose them," which, he said, he assuredly did not. Learned Hand, *The Bill of Rights*, 73 (1958). Congress is free to fix the statute if it needs fixing, and Congress knows how to do so if it wishes.

III.

Having reviewed Mr. Jama's remaining arguments, we conclude that they are without merit. Accordingly, for the reasons stated, we reverse the district court's order granting the writ, and remand the case to the district court for the

entry of an order denying Mr. Jama's habeas petition under 28 U.S.C. § 2241.

BYE, Circuit Judge, dissenting.

I agree the district court and this court have jurisdiction to consider Mr. Jama's habeas petition. I disagree, however, that 8 U.S.C. § 1231(b)(2) allows our government to remove Mr. Jama to Somalia before a functioning central government has indicated it will accept him. Because I would affirm the district court's order granting the writ, I respectfully dissent.

For nearly a half century, the courts have held the United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien. *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958); *United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468, 468 (S.D. N.Y. 1956).

Forty-four years ago, Judge Learned Hand interpreted the statutory provisions at issue here and concluded there were no circumstances under which the statute allowed the United States to deport an alien unless the receiving country was "willing to accept" him. *United States ex rel. Tom* ***636** *Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959) (quoting 8 U.S.C. § 1253(a), the precursor to 8 U.S.C. § 1231(b)(2)). Judge Hand's interpretation of the statute subsequently became well-settled. *See Chi Sheng Liu v. Holton*, 297 F.2d 740, 743-44 (9th Cir. 1961); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960); *Matter of Linnas*, 19 I. & N. Dec. 302, 307, 1985 WL 56051 (BIA 1985) ("[A] country selected under any of the three steps [set forth in § 1253(a)] *must* indicate it is willing to accept a deported alien into its 'territory'") (emphasis added); *see also Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988) (interpreting § 8 U.S.C. § 1227(a)(2), a "parallel" provision to § 1231(b)(2) which applies to excludable rather than removable aliens, and holding the statute requires a country to accept an alien prior to deportation).

The long-standing policy and, until recently, practice of the INS have been consistent with Judge Hand's interpretation. *See* 8 C.F.R. § 241.4(k)(1)(i) ("[T]he INS] shall conduct a custody review for an alien . . . where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien"); INS Operating Instruction 243.1(c)(1) ("Except for a limited class of aliens deported to contiguous territory, deportation cannot be effected until travel documentation has been obtained" and further providing for travel documents to be obtained from the country willing to accept an alien) (App. 103); *see also* 2 *Immigration Law Serv.* § 17.433 ("[D]eportation under Step Three is dependent upon the country in question being willing to accept the deportee into its territory.")

Each time Congress amended the INA or re-enacted the statutory provisions which now appear at § 1231(b)(2) without making any material changes to the precursor statute, it adopted the well-settled construction given the precursor by the courts and the INS. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"). The majority cites *In re Niesel*, 10 I. & N. Dec. 57, 59, 1962 WL 12904 (BIA 1962) for the proposition there was no settled judicial construction of the disputed provisions. I disagree. "*Niesel* simply held that the government appropriately disregarded a petitioner's designation and lawfully chose another country without *first inquiring* whether that country would accept the petitioner. Thus, *Matter of Niesel* addressed only the issue of an *initial* inquiry, not final acceptance of the country to which a person would be returned." *Ali v. Ashcroft*, 213 F.R.D. 390, 403 (W.D. Wash. 2003) (internal citations omitted) (emphasis in original).

Even if *Niesel* had held no final acceptance was required, the Board of Immigration Appeals clearly abandoned that position in *Linnas*.

We are not to interpret statutory text in a manner which leads to absurd results. *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994). The majority explains its interpretation of the statute in part by noting "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Ante* at 7. That is easier said than done. A government not willing to accept an alien will simply refuse his admittance into its country. Thousands of deportees from China, Viet Nam, Cambodia, Cuba and other countries continue to be detained in the United States because those countries are unwilling to accept them. *See* Donald ***637** M. Kerwin, Throwing Away the Key: Lifers in INS Custody, 75 Interpreter Release 649, 650-52 (1998). Those deportees can attest to the practical difficulty, if not impossibility, of acting anyway when a request is refused.

As a practical matter, then, the task of removing an alien to a country which has not accepted him will only be accomplished and the majority's construction of the statute will only be implicated when there is no functioning government to refuse the alien's acceptance, currently the case in Somalia. The absurdity of such a construction lies in the fact we require a functioning central government as an "essential aspect" of a "country" to which an alien can be deported. *Linnas*, 19 I. & N. Dec. at 307, 1985 WL 56051; *see also Ademi v. INS*, 31 F.3d 517, 521 (7th Cir. 1994) (recognizing it is impossible to seek acceptance from a country which has ceased to exist); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) ("[A]ny place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' . . . to which a deportable alien may be sent"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting a

"country" with the meaning of the statute requires a functioning government with undisputed control over a well-defined geographical area).

"Learned Hand warned that, absent order, liberty becomes license, ultimately leading to the denial of liberty. In a world of unbridled license, the strong do what they will and the weak suffer what they must." Remarks of Attorney General John Ashcroft, Eighth Circuit Judges Conference (Aug. 7, 2002). I fear if we "act anyway" by deporting Mr. Jama to Somalia, we abuse our great strength at the expense of the weak. With this change in policy, we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords, and without a central government. By doing so, I fear we abandon order and risk the doom of liberty.

Because the government's recent disregard of a well-settled and accepted construction of § 1231(b)(2) does not accord with my sense of liberty or justice, I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Full name and prisoner number of Petitioner,
vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Name of Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
PERSONS IN FEDERAL CUSTODY
UNDER TITLE 28 USC SECTION 2241

Civil No. _____

[Received by Mail: June 28, 2001]

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the U. S. District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each question. (If a particular question is not applicable, that should be specifically noted.) If necessary, petitioner may finish the answer to a particular question on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, the false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is submitted in forma pauperis, it shall include the Application To Proceed In Forma Pauperis (AO 240-10/96). Petitioner should be mindful of the changes in IFP procedures effected by the "Prison Litigation Reform Act".

When the petition is completed, the original and one copy together with a JS-44 Civil Cover Sheet must be mailed to: Office of the Clerk, United States District Court, 708 Federal Building, 316 North Robert Street, St. Paul, MN 55101. The petition must be accompanied by either (a) the full filing fee of $5.00, make check payable to U.S. District Court or (b) a properly completed IFP application (with the initial partial filing fee, if required by 28 U.S.C. Section 1915(b) (1).)

1. Place of detention: Sherburne County Jail

2. Name and location of court which imposed sentence: Board of Immigration Appeals

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) A71-689-585

4. The date upon which sentence was imposed and the terms of the sentence:

(a) Current

5. Check whether a finding of guilty was made:

(a) After a plea of guilty: N/A

(b) After a plea of not guilty: N/A

(c) After a plea of nolo contendere: N/A

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) A jury: N/A

(b) A judge without a jury: Review/Opinion

7. Did you appeal the judgment of conviction or the imposition of sentence? In Immigration Court

8. If you answered "yes" to Item 7, list:

(a) The name of each court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) The result in each such court to which appealed:

i. Deportation!

ii.

(c) The date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) If known, citations of any written opinions or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Each ground for relief should be described separately, and each ground should include (1) a concise statement of the relevant facts and (2) a brief description of the legal principle(s) on which it is based.

Ground 1: My Country has no Government, is unstable, and all my Family is in the United States!

Ground 2: N/A

Ground 3: N/A

Additional grounds may be set forth on an attached page.

10. Have you filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States Code, or other applications, Petitions or motions with respect to this conviction? No.

11. If you answered "yes" to Item 10, list with respect to each petition, motion or application:

(a) The specific nature thereof:

i. N/A

ii. N/A

iii. N/A

(b) The name and location of the court in which each was filed:

i. N/A

ii. N/A

iii. N/A

(c) The disposition thereof:

i. N/A

ii. N/A

iii. N/A

(d) The date of each such disposition:

i. N/A

ii. N/A

iii. N/A

(e) If known, the citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

12. If you did not file a motion under Section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, then for each ground raised here, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

If there are additional grounds, attach a separate page.

13. Has any ground set forth in Item 9 (above) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under Section 2255 of Title 28, United States Code, or any other petition, motion or application? N/A

14. If you answered "yes" to Item 13, identify all of the proceedings in which each such ground was raised:

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

If there are additional grounds, attach a separate page.

15. Have any of the grounds for relief presented in this petition been raised in any prison grievance procedure or administrative remedies procedure? N/A

16. If you answered "yes" to Item 15, then for each ground that has been raised describe (1) each step that was taken to resolve the claim through a grievance procedure or administrative remedies procedure and (2) the disposition of the claim at each step.

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

(Copies of any written materials pertaining to grievance procedures or administrative remedies procedures – including statements of the claim(s) presented and responses received – should be attached to this petition.)

17. Are there any administrative remedies available for any of your grounds for relief that have not been exhausted? N/A

18. If you answered "yes" for Item 17, then for each such unexhausted ground for relief, explain why the available administrative remedies were not fully exhausted. N/A

19. If you were represented by an attorney during any of the following procedures, then state the name and address of such attorney(s):

(a) Your appearance before a United States Commissioner?

Name N/A

Address N/A

(b) Your arraignment and plea?

Name N/A

Address N/A

(c) Your trial, if any?

Name N/A

Address N/A

(d) Your sentencing?

Name N/A

Address N/A

(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence?

Name N/A

Address N/A

(f) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Name N/A

Address N/A

20. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information? (see instructions, page 1 of this form) yes

/s/ Keyse Jama

Signature of Petitioner

Keyse G. Jama, being first sworn under oath, presents that he/she has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his/her knowledge and belief.

/s/ Keyse Jama

Signature of Affiant

SUBSCRIBED AND SWORN to before me this

_____ day of _____, _____

(month) (year)

_____

Notary Public

My commission expires:

_____

(Month, Day, Year)

NOTARIZATION IS NOT NECESSARY IF THE FOLLOWING STATEMENT IS COMPLETED:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6/10/01
(Date)

/s/ Keyse Jama
(Signature)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

Civil File No. 01-1172 (JRT/AJB)

REPORT AND
RECOMMENDATION

Jeffrey J. Keyes and Kevin M. Magnuson, Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota, 55402, for Petitioner.

Lonnie F. Bryan, Assistant U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, 55415, for Respondent.

ARTHUR J. BOYLAN, United States Magistrate Judge

Petitioner commenced this action by filing an application for habeas corpus relief pursuant to 28 U.S.C. § 2241. He is asking the Court to enter an order that would bar Respondent, the United States Immigration and Naturalization Service, ("INS"), from removing him to Somalia. He claims that Respondent cannot legally deport him to Somalia, because that country has not agreed to accept him.

Respondent has filed an answer, contending that this action should be dismissed for lack of jurisdiction. Respondent further contends that, in any event, Petitioner can legally be removed to Somalia, even though there has been no indication that he will be accepted there.

The matter has been referred to the undersigned for report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1(c). For the reasons discussed below, I conclude that (a) Petitioner's habeas corpus petition can properly be entertained here, and (b) Petitioner cannot legally be removed to Somalia until that country agrees to accept him. It will therefore be recommended that habeas corpus relief be granted to Petitioner in the form of an order that bars Respondent from removing him from the United States until Somalia, or some other country, has agreed to accept him.

I. BACKGROUND

Petitioner was born in Somalia in 1979. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, Petitioner and his family applied for admission to the United States as refugees. Their application was granted, and Petitioner arrived in the United States on or about February 27, 1996. He came to Minnesota shortly thereafter. Petitioner settled in the Twin Cities area, where he worked and went to school. He never became a citizen or permanent resident alien, but simply retained his refugee status.

In June of 1999, Petitioner got into a fight with another man. The man suffered a substantial injury, and Petitioner was charged with assault. In September 1999, he pleaded guilty to third degree assault – a felony under Minnesota law – and was sentenced to one year and one day in prison. His prison sentence was stayed and he was placed on probation for three years. He violated the conditions of his probation, so he ended up serving time in state prison.

Because of Petitioner's felony conviction, the INS initiated removal proceedings against him in late 1999. When he completed his state prison term in 2000, he was taken into INS custody. Petitioner attempted to avoid removal by filing an application for asylum, claiming that he would be persecuted if he returned to Somalia. He raised the

same argument in a separate application for relief under the "Convention Against Torture." He also filed an application seeking permanent resident alien status.

In August 2000, an immigration judge conducted a hearing to determine whether Petitioner should be removed from the United States. The immigration judge later issued a decision, in which he held that Petitioner was removable because he had been convicted of a "crime of moral turpitude." The immigration judge also rejected Petitioner's various applications for asylum and permanent resident alien status.[1] Petitioner did not request that he be sent to any particular country, so the immigration judge directed the INS to remove him to his homeland -- Somalia.

Petitioner appealed the immigration judge's decision to the Board of Immigration Appeals, but his removal order was affirmed. He never sought judicial review of the INS removal order, and he concedes, (at least implicitly), that the removal order has become final. On May 25, 2001, the INS formally notified Petitioner that the removal order would be executed.

As far as the Court can tell, Petitioner has been held by the INS at all times since he completed his state prison sentence in June 2000. The INS detained him for several

---

[1] The immigration judge noted that Petitioner had been arrested numerous times before his assault conviction, and that he had compiled an extensive disciplinary record while serving his state prison sentence. According to the immigration judge, Petitioner "was subjected to numerous violation reports, which ultimately resulted in him losing all his good time in prison, and being required to serve the entirety of his sentence. [Petitioner] was transferred from lower security institutions up to Oak Park Heights Prison, which is the highest security classification prison in the Minnesota System." (Government Exhibits, [Docket No. 8], p. 177.) Respondent has submitted various prison records that tend to corroborate the immigration judge's suggestion that Petitioner was a very hostile inmate. (Government Exhibits, pp. 115-39.)

months at the Minnesota Correctional Facility in Rush City, Minnesota, but when he filed his current habeas corpus petition, on June 28, 2001, he was being detained at the Sherburne County Jail in Elk River, Minnesota. It is unclear whether Petitioner is still in custody in Sherburne County, or whether he has been transferred to some other detention facility.

It is important to note that Petitioner is not presently challenging the validity of his removal order; nor is he challenging his current INS detention *per se*. Instead, Petitioner is challenging the manner in which the INS is planning to execute the removal order. More specifically, Petitioner is claiming that the INS should not be allowed to physically transport him to Somalia, and drop him off there, unless and until some proper governmental authority in Somalia has agreed that he can be left there.

According to Petitioner, there is no proper governmental authority in Somalia that can approve his return to that country at this time, because Somalia presently has no government. Respondent acknowledges that "Somalia has been without a functioning central government since 1991." (Respondent's Return, [Docket Nos. 5, 6 & 7], p. 6.) Moreover, neither party suggests that Somalia is likely to have a functioning central government any time soon.[2]

---

[2] According to Respondent:

> On June 15, 2000 in Arta, Djibouti more than 900 delegates, representing various clans and a wide spectrum of Somali society, beg[a]n establishing a central and unified government in Somalia. In July 2000, the delegates adopted a charter establishing a transitional government including an elected assembly and president. Although this Transitional Government continues to pursue unification, Somaliland and Puntland [two major provinces] do not currently recognize the transitional government.

(Respondent's Return, p. 7.)

Respondent claims that there is no need to obtain anyone's consent before sending Petitioner back to Somalia, and that it has a plan to repatriate Petitioner, which can be executed without the acquiescence of anyone in Somalia. That plan, as explained in Respondent's Return, is as follows:

> The INS intends to give Petitioner a choice of four cities in Somalia where he can be dropped off. After Petitioner has selected a city to land in, the INS intends to prepare, and issue to him, a "Form I-269 (Certificate of Identity) which is used when a passport travel document is unavailable." (Respondent's Return, p. 8.) The INS would then prepare a travel itinerary to return Petitioner to Somalia. If the INS follows its past practice, (and there is no indication that it will not), Petitioner probably would be put on a plane with two INS deportation officers and sent to Sweden. From there, Petitioner and the two deportation officers would fly to the City of Dubai, in the United Arab Emirates. The deportation officers would then put Petitioner on another flight bound for the Somali city of his choice, and Petitioner would travel that final leg of the journey alone. The deportation officers apparently would stay in Dubai long enough to satisfy themselves that Petitioner was not returned to Dubai on a flight back from Somalia. (Respondent's Exhibits, [Docket No. 8], pp. 243-44.) They would then return to the United States, presumably without any knowledge of Petitioner's fate upon his arrival in Somalia.

Respondent represents that the foregoing plan has been used to return at least 14 Somalis to their homeland during the past few years, and that the plan can be used to successfully remove Petitioner. Moreover, Respondent apparently is confident that Petitioner will be relatively safe and secure upon returning to Somalia – assuming he chooses to return to a city controlled by members of his own clan. (Respondent's Return, p. 6.)

Petitioner contends that the INS has grossly underestimated (or else understated) the danger that he would face if he were returned to Somalia. He cites news reports of people being killed recently "at the very airport where the INS seeks to drop [him]." (Petitioner's Memorandum, [Docket No. 11], p. 3.) However, Petitioner readily acknowledges that the outcome of this case should not be determined by weighing and deciding how much danger might await him in Somalia. Instead, Petitioner contends that the issue to be resolved here is whether it is legal for the INS to drop him off (quite literally) in Somalia, without first obtaining some type of consent, approval or acceptance from some Somali governmental authority. This appears to be an accurate description of the dispositive issue in this case; and the Court finds that the issue should be resolved in Petitioner's favor.

II. JURISDICTION

Before reaching the legal issue raised by Petitioner, it is first necessary to determine whether this case can properly be entertained in a federal district court. Respondent contends that this action should be summarily dismissed for lack of jurisdiction, and that contention must be resolved before Petitioner's substantive claim can be addressed on the merits.

Respondent's jurisdictional argument is based on 8 U.S.C. § 1252(g), which reads as follows:

> "(g) Exclusive Jurisdiction.
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

Respondent contends that this statute forbids federal district courts from exercising jurisdiction in any type of action – including a habeas corpus action – brought by an alien who is attempting to challenge the execution of a removal order. The instant Petitioner is challenging the INS's execution of the removal order entered against him, and therefore, Respondent argues, § 1252(g) deprives the Court of jurisdiction in this matter.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ["*AADC*"], the Supreme Court concluded that § 1252(g) does indeed deprive federal courts of jurisdiction over actions challenging INS discretionary decisions in the three areas listed in the statute – (1) decisions involving the commencement of removal proceedings, (2) decisions made during the adjudication of removal cases, and (3) decisions pertaining to the execution of removal orders. According to Respondent, *AADC* clearly confirms that § 1252(g) bars Petitioner's current challenge to the INS's execution of his removal order.

Petitioner disagrees. He points out that *AADC* was not a habeas corpus case. Therefore, he argues, it is not controlling here.

At least the premise of Petitioner's argument is certainly correct – *AADC* was <u>not</u> a habeas case. It was a civil lawsuit brought by a group of aliens who claimed that the INS was using selective enforcement tactics to harass them and deport them based on their nationality. The plaintiffs in *AADC* wanted the federal district court to enter an injunction and declaratory judgment that would end the INS's allegedly discriminatory practices. *AADC*, 525 U.S. at 473-75. Thus, Petitioner is correct when he contends that *AADC* did not directly address the specific jurisdictional issue presented here – namely, whether § 1252(g) eliminates *habeas corpus* review of INS actions pertaining to the execution of removal orders. The resolution of this issue, Petitioner contends, is

governed by the Supreme Court's more recent decision in *I.N.S. v. St. Cyr*, 121 S.Ct. 2271 (2001). The Court agrees.

In *St. Cyr*, a resident alien wanted the INS to waive a removal order that had been entered against him because he had been convicted of a crime. The INS contended that two laws enacted in 1996, the Anti-terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act, ("IIRIRA"), took away the Attorney General's authority to waive removal orders. The alien, St. Cyr, filed a habeas corpus action claiming that the Attorney General still retained such authority, (and, presumably, that such authority should be exercised in his favor).

Before reaching the merits of St. Cyr's claims, the Supreme Court had to decide whether those claims could properly be raised in a habeas corpus proceeding. The Attorney General argued that habeas review was barred by four sections of the new 1996 laws – section 401(e) of AEDPA, and three sections of IIRIRA – 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9). *St. Cyr*, 121 S.Ct. at 2278.[3] Even though all four of these laws broadly bar

[3] The first of these new laws (AEDPA § 401(e)) repealed 8 U.S.C. § 1105a(a)(10), which had provided that "any alien held in custody pursuant to an order of deportation may obtain review thereof by habeas corpus proceedings." *See id.* at 2284. The second new law, 8 U.S.C. § 1252(a)(2)(C), provides that "[j]udicial review of a final order of removal" is available only in a federal circuit court of appeals. *See id.* at 2285. The third new law, 8 U.S.C. § 1252(b)(9), similarly indicates that "[j]udicial review of all questions of law and fact, including interpretations and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section" – i.e., only in the court of appeals. Finally, 8 U.S.C. § 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain crimes specified by law. *See St. Cyr*, 121 S.Ct. at 2284-85.

"judicial review" of INS removal orders, the Supreme Court concluded that St. Cyr could still raise his legal arguments pertaining to his removal order in a habeas corpus petition filed in a federal district court.

In reaching that conclusion, the Supreme Court was guided by the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." 121 S.Ct. 2278. The Court also noted "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 2290, quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Finally, the Court emphasized that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *St. Cyr*, 121 S.Ct. at 2279, quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). Because habeas corpus appeared to be the only means by which St. Cyr could secure "judicial intervention" in his case, the Court found that a serious constitutional problem would exist if the various new laws cited by the INS actually did bar St. Cyr from seeking habeas corpus relief. *St. Cyr*, 121 S.Ct. at 2282. In the words of the Court, "a serious Suspension Clause[4] issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn . . . the power [to issue the writ of habeas corpus] from federal judges and provided no substitute for its exercise." *Id.*

Applying these same principles here, this Court finds that § 1252(g) does not bar the instant Petitioner from seeking habeas corpus relief under 28 U.S.C. § 2241. In this case, as in *St. Cyr*, the statute at issue does not expressly purport to divest the federal district courts of habeas corpus jurisdiction.

[4] The "Suspension Clause" is Article I, Section 9, Clause 2 of the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Section 1252(g) does not specifically mention habeas corpus review, and it should not be understood to eliminate such review merely by implication. *See Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Gavilan-Cuate v. Yetter*, 94 F. Supp. 2d 1039, 1040-42 (D. Minn. 2000) (emphasizing that AEDPA and IIRIRA could not repeal federal habeas corpus jurisdiction "by mere implication"), *rev'd on other grounds*, 276 F.3d 418 (8th Cir. 2002).

Although the jurisdiction limiting language used in § 1252(g) is certainly broad, ("no court shall have jurisdiction to hear any cause or claim"), it does not necessarily encompass habeas corpus jurisdiction. As the Supreme Court pointed out in *St. Cyr*, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings." 121 S.Ct. at 2285. Here, as in *St. Cyr*, the statute at issue appears to be aimed only at "full, nonhabeas review," and does not "explicitly mention[] habeas, or 28 U.S.C. § 2241." *Id.* at 2286. The Court finds that § 1252(g), like the statutes examined in *St. Cyr*, is not worded with the clarity and specificity needed to take away the constitutionally-protected, and presumptively-favored, right to habeas corpus review.

Moreover, if Respondent's interpretation of § 1252(g) were adopted, and the remedy provided by the federal habeas statutes were therefore unavailable to Petitioner, it appears that he would have no opportunity to seek judicial review of his current claim. Respondent has not suggested that Petitioner might have some other non-habeas means of bringing his current claim before a federal judge, and the Court is not aware of any other option. The absence of any non-habeas remedy for Petitioner's present legal argument further undermines Respondent's interpretation of § 1252(g). *See St. Cyr*, 121 S.Ct. at 2279 ("[a] construction of the [statutes] at issue that would entirely preclude review of a pure question of law by any court would give rise to serious constitutional questions").

Depriving Petitioner of any federal judicial remedy would be especially objectionable in this particular case, because Petitioner is not challenging any factual or discretionary determination made by the INS. Instead, he is attempting to raise a purely legal issue – i.e., whether federal law allows the INS to send a removable alien to a country that has not agreed to accept him. As a general rule, such purely legal issues may properly be raised and decided in habeas proceedings. *St. Cyr*, 121 S.Ct. at 2283 ("[i]n case after case, courts [have] answered questions of law in habeas proceedings brought by aliens challenging Executive interpretations of immigration laws").[5]

Even before *St. Cyr*, some circuit courts had determined that recent amendments to the federal immigration laws could not be interpreted to eliminate federal habeas review for aliens facing removal. *See Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. I.N.S.*, 157 F.3d 106, 117-22 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).[6] After *St. Cyr*, there can be little doubt that the new laws, including § 1252(g), do not eliminate federal habeas review of the legal claims of removable aliens. As the First Circuit Court of Appeals recently put it: "In light of *St. Cyr*, INS's principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation – is a dead letter." *Carranza v. Immigration and Naturalization Service*, No. 00-2365 (1st

---

[5] Because the key substantive issue raised by Petitioner is a legal issue, this case is distinguishable from other alien habeas cases that have been dismissed for lack of jurisdiction. *See, e.g., Sol v. I.N.S.*, 274 F.3d 648, 651 (2nd Cir. 2001) ("fact-intensive review is vastly different from what the habeas statute plainly provides: review for statutory or constitutional errors").

[6] The Supreme Court noted these decisions, without voicing any disapproval of them, in *AADC*. *See AADC*, 525 U.S. at 480, n.7.

Cir. Jan. 17, 2002), 2002 WL 47139, at *6. The court agrees with this assessment of Respondent's jurisdictional argument based on § 1252(g), and adopts it here. I further agree with the First Circuit's conclusion that "[f]ederal courts . . . retain subject matter jurisdiction over habeas petitions brought by aliens facing removal to the extent that those petitions are based on colorable claims of legal error, that is, colorable claims that an alien's statutory or constitutional rights have been violated." *Id.* at *5.

In sum, while § 1252(g) generally eliminates judicial review of removal orders against aliens, it does not bar federal courts from entertaining habeas corpus petitions brought by criminal aliens who are attempting to challenge removal proceedings on legal or constitutional grounds. It follows that Petitioner's current claims, challenging the legality of the INS's plan to remove him, can properly be entertained in a habeas corpus petition brought under 28 U.S.C. § 2241.

III. THE MERITS OF PETITIONER'S HABEAS CLAIM

8 U.S.C. § 1231(b)(2) establishes a three-step selection process for determining where a removable alien should be sent after a final removal order has been entered against him. First, the alien may designate a country to which he wants to be sent; and if he does so, the Attorney General will send him there – subject to certain limitations and restrictions. 8 U.S.C. § 1231(b)(2)(A), (B) and (C). If the alien does not designate a country to which he wants to be sent, or if he designates a country that is statutorily unacceptable, (*see* 8 U.S.C. § 1231(b)(2)(B) and (C)), the selection process proceeds to the next step. At step two, the INS is directed to send the alien back to the country where he is a citizen – if that country indicates that it will accept him. The step two statute, § 1231(b)(2)(D), says that –

> "The Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country –
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.

Step three of the removal process is set forth at 8 U.S.C. § 1231(b)(2)(E), which provides as follows:

> (E) Additional removal countries
>
> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> (i) The country from which the alien was admitted to the United States.
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> (iv) The country in which the alien was born.
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
>
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

In this case, the INS contends (and Petitioner apparently agrees) that Petitioner's removal destination is not determinable at step one of the selection process, because Petitioner did not designate a removal destination in a proper and timely manner. It is also apparent that a removal destination cannot be determined at step two of the selection process, because the "government of the country" of which Petitioner is a "subject, national, or citizen," (namely Somalia), has not informed the INS that it "will accept [Petitioner] into the country." 8 U.S.C. § 1231(b)(2)(D)(i). Indeed, the parties agree that the "country of Somalia" has no functioning government that could accept Petitioner.[7]

---

[7] The parties strongly disagree about whether Somalia is in fact a "country" at all. Respondent says it is; while Petitioner says it is not. The Court does not find it necessary to resolve that semantical debate in order to decide whether Petitioner is entitled to relief. For present purposes, the Court will accept Respondent's assertion that Somalia is a country. The fact remains, however, that Somalia has no functioning government, so the "government of the country" to which the INS wants to send Petitioner has not expressed, (and cannot express), a willingness to accept him.

In a footnote in its initial Return, Respondent suggests that perhaps Petitioner could be removed to Somalia at step two, (i.e., pursuant to § 1231(b)(2)(D)), even though no government in Somalia has expressed a willingness to accept him. (Return, p. 28, n. 16.) Respondent seems to believe that if a country has no government, then the government acceptance requirement is simply "not relevant." (*Id.*) As Petitioner has aptly noted, this is an "extraordinary interpretation" of the statute. (Petitioner's Memorandum, p. 10.) Respondent has offered no logic or authority to support its proposition that the governmental acceptance requirement in § 1231(b)(2)(D) can simply be ignored where a country has no government. The Court rejects that proposition.

Thus, the Court finds that Petitioner's removal destination must be determined at step three of the selection process, which means that § 1231(b)(2)(E) is controlling. Respondent contends that Petitioner can be removed to Somalia pursuant to § 1231(b)(2)(E)(iv), which allows the INS to remove an alien to "[t]he country in which the alien is born." Petitioner argues that the INS cannot send him to Somalia pursuant to § 1231(b)(2)(E)(iv), (or otherwise), unless the government of Somalia first agrees to accept him back into that country. Again, the Court agrees with Petitioner.[8]

The acceptance requirement included at step two of the selection process, (§ 1231(b)(2)(D)), would be rendered all but meaningless if the INS could send an alien back to the country in which he was born without obtaining that country's consent. As Petitioner points out, (and Respondent does not deny), an alien will almost always be a "subject, national or citizen" of the country in which he is born. Therefore, under Respondent's interpretation of § 1231(b)(2)(E)(iv), the acceptance requirement at step two of the selection process, (§ 1231(b)(2)(D)), could be easily circumvented in just about every case. If an alien could not be returned to the country of which he is a "subject, national or citizen" because that country had not agreed to accept him, then, under Respondent's interpretation of § 1231(b)(2)(E)(iv), the INS could still return the alien to that country, (even without that country's acceptance), if that were the country where he had been born. Under

---

[8] The Court rejects Respondent's suggestion that Petitioner is somehow attempting to "create a private cause of action" for himself out of § 1231(b)(2)(E). (*See* "Reply of Respondent," [Docket No. 15], pp. 7-9.) It is Respondent who contends that § 1231(b)(2)(E) is controlling here, and that it provides the legal authority for its plan to remove Petitioner to Somalia. Petitioner is merely opposing Respondent's contention, arguing that § 1231(b)(2)(E) does not authorize Respondent to send him to Somalia without acceptance by a Somali government.

Respondent's reading of the statute, the acceptance requirements of § 1231(b)(2)(D) could be evaded whenever an alien was born in a country of which he is a subject, national or citizen – which is almost always the case. Congress could not have intended for § 1231(b)(2)(E)(iv) to essentially eliminate the acceptance requirement of § 1231(b)(2)(D), by allowing the INS to avoid that requirement in virtually every case.

Furthermore, all of the relevant case law suggests that an alien cannot be removed to another country, including the country of his birth, unless that country has agreed to accept him. The case law uniformly indicates that the acceptance requirement set forth in § 1231(b)(2)(E)(vii), (allowing removal to "another country whose government will accept the alien into that country"), was meant to apply to all of the clauses of § 1231(b)(2)(E), including § 1231(b)(2)(E)(iv).

The leading case on this issue appears to be *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2nd Cir. 1959) ("*Tom Man*"). In that case, the INS was attempting to deport an alien to China. At the time, the United States did not have diplomatic relations with the country known as "Mainland China" or "Communist China," but the INS contended that the alien could properly be sent there, even though there was no indication that he would be accepted when he arrived there. The court in *Tom Man* considered whether the alien could be returned to Mainland China pursuant to 8 U.S.C. § 1253(a)(3), which was the statutory predecessor of § 1231(b)(2)(E)(iv). Section 1253(a)(3) allowed the INS to deport an alien "to the country in which he was born," if the country of which he was a "subject, national or citizen" did not agree to accept him. Section 1253(a)(3) did not expressly include an acceptance requirement, just as the currents § 1231(b)(2)(E)(iv) does not expressly include such a requirement. However, § 1253(a)(7), the last subdivision of § 1253(a), did include an acceptance requirement, just as § 1231(b)(2)(E)(vii) does now.

In *Tom Man*, the court concluded that deportation under any of the subdivisions of § 1253(a) "is subject to the condition expressed in the seventh subdivision; i.e., that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. Thus, the court held that the alien could not be deported to Mainland China, pursuant to § 1253(a)(3) or otherwise, unless there was a "mutual agreement between that 'country' and ourselves.'" *Id.*

Tom Man is not an anomaly; other courts have also concluded that the INS cannot deport an alien to a country that has not agreed to accept him. In *Lu v. Rogers*, 164 F. Supp. 320, 321 (D.D.C. 1958), *aff'd* 262 F.2d 471 (D.C. Cir. 1958), the court concluded that 8 U.S.C. § 1253(a) "require[d] a determination that the country to which the alien is to be sent is willing to accept him" and that such determination "must be made prior to the time of the deportation." The Court ordered that the Attorney General would be "restrained from apprehending and deporting the plaintiff unless prior expression of willingness to accept him has been received from communist China to which it is proposed to deport him." *Id.* at 322. Similar decisions can be found in *United States ex rel. Wong Kan Wong v. Esperdy*, 197 F. Supp. 914, 917 (S.D.N.Y. 1961) ("unless and until the respondent (the government) makes preliminary inquiry and . . . receives an expression of 'willingness to accept,' the relator [alien] may not be deported to the mainland of China"), and *Hom Sin v. Esperdy*, 209 F. Supp. 3, 4 (S.D.N.Y. 1962) (recognizing that "deportation may not be effected unless the [removal destination] country is willing to accept [the deportable alien] into its territory").

It must be acknowledged that all of the relevant cases are quite old, and that all of them interpreted an earlier and somewhat different version of the statute that is now § 1231(b)(2). Furthermore, those cases are factually different because they involved aliens who were slated to be deported to a country whose government was not formally recognized

by the United States, (China), while in this case we have a country that has no government at all, (Somalia). Nevertheless, the various Chinese deportation cases cited above are directly relevant to the issue presented here, i.e., whether an alien can be removed to a country that has not yet agreed to accept him. Those cases clearly indicate that an alien cannot be sent to a country that has not agreed, in advance, to take him. Moreover, Respondent, in 50 pages of briefing, has not cited a single case in which a federal court has sanctioned the removal of a legally-admitted alien to a country that has not agreed to accept him. Thus, the Court finds that § 1231(b)(2) does not authorize the INS to remove Petitioner to any country that has not agreed to accept him.

IV. CONCLUSION

For the reasons discussed above, the Court concludes that (a) Petitioner's current claim for relief can properly be raised and adjudicated in a habeas corpus proceeding, notwithstanding the jurisdictional restrictions of 8 U.S.C. § 1252(g); and (b) Petitioner cannot be removed to a country unless some governmental authority in that country agrees to accept him. The conclusion reached on the jurisdictional issue is based primarily on the Supreme Court's recent decision in *St. Cyr*. The conclusion reached on Petitioner's substantive claim for relief is based on a construction of 8 U.S.C. § 1231(b)(2) that is consistent with the case law interpreting that statute's predecessor, 8 U.S.C. § 1253(a).[9]

It bears repeating that the Court has not been asked to review the legality or validity of the removal order entered against Petitioner. That order remains in full force and

[9] Petitioner has presented additional arguments in support of his substantive claim for relief that are based on INS administrative regulations and the Constitution's Due Process Clause. (Petitioner's Memorandum, pp. 18-23.) The Court has not found those arguments to be persuasive, and does not adopt them here.

effect. Nor has the Court been asked to review the legality or validity of Petitioner's current and/or future detention by the INS.[10] That issue has not been presented here and will not be addressed here.

It also bears repeating that the Court is not second-guessing any factual determination made by the INS, including the type of danger that Petitioner might face if he were returned to Somalia. Nor is the Court second-guessing any discretionary determination that the INS has made in this matter. The issue presented and resolved in this case is purely a legal one: Do the federal immigration laws permit the INS to deposit a removable alien in a country that has not agreed to accept him? The INS has not convinced this Court that the law, specifically 8 U.S.C. § 1231(b)(2)(D)-(E), authorizes the INS to do what it intends to do. Only that legal issue has been decided here.

Finally, we must consider the exact nature of the relief that should be granted in this case. Customarily, of course, a writ of habeas corpus directs the named respondent to release the petitioner from custody. Such relief, however, would not be appropriate here. Petitioner has not asked to be released from custody, and he has not shown that he is entitled to be released. Instead, Petitioner has asked only that the INS be ordered not to remove him without first obtaining confirmation from a government that he will be accepted. The Court has concluded that Petitioner should be granted the relief he has requested, and the remedy available under the federal habeas corpus laws is broad enough and flexible enough to provide such relief.[11] It will therefore be

[10] *See* Petitioner's Memorandum, p. 29 ("Petitioner does not challenge the 90 day detention [period for effecting removal] but challenges the physical removal in violation of the statute").

[11] In *St. Cyr*, for example, the habeas petitioner was not seeking release from custody *per se* he was only seeking an order that would compel the INS to consider whether he should be granted a discretionary waiver of removal. By granting St. Cyr's habeas petition, the courts presumably

recommended that Respondent be ordered not to remove Petitioner to another country, unless the government of that country first agrees to accept him.

V. RECOMMENDATION

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus, (Docket No. 1), should be GRANTED; and

2. Respondent should be ordered not to remove Petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him.

DATED: February 1, 2002

/s/

ARTHUR J. BOYLAN

United States
Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this report and recommendation by filing with the Clerk of Court and serving all parties, within ten days after being served with a copy thereof, written objections which specifically identify the portions of the proposed findings, recommendations or report to which objection is being made, and a brief in support thereof. A party may respond to the

---

did not set him free, but merely directed the INS to consider whether he should be granted a waiver. *See also Martin v. Gerlinski*, 133 F.3d 1076, 1081 (8th Cir. 1998) (granting habeas relief in the form of an order directing the federal Bureau of Prisons to consider whether petitioner should be allowed early release pursuant to 18 U.S.C. § 3621(e)(2)(B)).

objecting party's brief with ten days after service thereof. All briefs filed under this rule shall be limited to ten pages. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable directly to the Circuit Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

Civil File No. 01-1172 (JRT/AJB)

MEMORANDUM OPINION
AND ORDER ADOPTING THE
REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE

Jeffrey J. Keyes and Kevin M. Magnuson, BRIGGS AND MORGAN, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN, 55402, for petitioner.

Lonnie F. Bryan, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415; Christine A. Bither and Greg D. Mack, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, 1331 Pennsylvania Avenue, NW, Room 700S, Washington D.C., 20530, for respondent.

Petitioner Keyse Jama filed a petition for a writ of habeas corpus, seeking an order that would bar the United States Immigration and Naturalization Service ("INS") from removing him to Somalia. He claims that the INS cannot legally deport him to Somalia because Somalia has not agreed to accept him. The INS responded by filing a motion to dismiss on the basis that 8 U.S.C. § 1252(g) deprives the Court of jurisdiction over petitioner's claim. Even assuming the Court has jurisdiction, according to the INS, petitioner

can be legally removed to Somalia even though there has been no indication that he will be accepted there.

On February 1, 2002, United States Magistrate Judge Arthur J. Boylan concluded that § 1252(g) does not deprive a federal court of habeas jurisdiction under 28 U.S.C. § 2241. Reaching the merits of petitioner's claim, the Magistrate Judge concluded that petitioner cannot be removed to a country unless the governmental authority in that country agrees to accept him. Accordingly, he recommended to the Court that petitioner's application for a writ of habeas corpus be granted and that the INS be ordered not to remove petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him. This matter is now before the Court on the objections of the INS to the report and recommendation.

The Court has conducted a *de novo* review of petitioner's objections pursuant to 28 U.S.C. § 636(b)(l)(C) and D. Minn. L.R. 72.1(c)(2). For the reasons set forth below, the Court overrules the government's objections, adopts the report and recommendation of the Magistrate Judge, and orders the INS not to remove petitioner from the United States.

BACKGROUND

The facts of the case are undisputed. Petitioner was born in Somalia in 1979. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, petitioner and his family applied for admission to the United States as refugees. Their application was granted and petitioner arrived in the United States in February 1996 and later came to Minnesota. Petitioner settled in the Twin Cities area, where he worked and attended school. He never became a United States citizen or permanent resident alien, but simply retained his refugee status.

In June 1999, petitioner fought with another man. The man suffered a substantial injury, and petitioner was charged with assault. In September 1999, petitioner pled guilty to third degree assault – a felony under Minnesota law – and was sentenced to one year and one day in prison. His prison sentence was stayed and he was placed on probation for three years. Because he violated the conditions of his probation, he served time in state prison.

The INS then initiated removal proceedings against petitioner as a result of his felony conviction and he was taken into INS custody after completion of his state prison term in June 2000.[1] Petitioner attempted to avoid removal by filing an application for asylum, claiming that he would be persecuted if he returned to Somalia. He also filed a separate application for relief under the United Nations Convention Against Torture and filed an application for permanent resident alien status. In August 2000, an immigration judge conducted a hearing to determine whether petitioner should be removed from the United States. The immigration judge held that petitioner was removable because he had been convicted of a "crime of moral turpitude." He also rejected petitioner's applications for asylum and permanent resident legal status. Petitioner did not request that he be sent to any particular country, therefore, the immigration judge directed the INS to remove him to his homeland – Somalia. The immigration judge's decision was affirmed on appeal to the Board of Immigration Appeals ("BIA"). On May 25, 2001, the INS formally notified petitioner that the removal order would be executed.

---

[1] Petitioner has been held in INS custody at all times since then. The INS detained petitioner for several months at the Minnesota Correctional Facility in Rush City, Minnesota and he was being detained at the Sherburne County Jail in Elk River, Minnesota at the time he filed his habeas petition. It is not clear whether petitioner is still in custody in Sherburne County or whether he has been transferred to some other detention facility.

Petitioner filed the current petition for habeas relief on June 28, 2001. Petitioner is not challenging the validity of his removal order nor is he challenging his current INS detention *per se*. Instead, petitioner is challenging the manner in which the INS plans to execute the removal order. More specifically, petitioner claims that the INS should not be allowed to physically transport him to Somalia and drop him off there, unless and until some proper governmental authority in Somalia has agreed to accept him.

The INS concedes that Somalia has been without a functioning central government since 1991. However, the INS claims that 8 U.S.C. § 1231(b)(2)(E)(iv) does not require consent before sending petitioner back to Somalia, the country where he was born. The Magistrate Judge disagreed with that argument, concluding that both the statutory language and relevant caselaw require that acceptance from a proper governmental authority be obtained before petitioner can be removed.

DISCUSSION

The INS objects to the report and recommendation of the Magistrate Judge, claiming that the Court lacks jurisdiction under 8 U.S.C. § 1252(g), the report and recommendation misconstrues the relevant statute, 8 U.S.C. § 1231(b)(2), and the habeas petition presents a nonjusticiable political question. The Court addresses each argument in turn.

I. Jurisdiction

The INS first argues that the Magistrate Judge erred in finding that the Court has habeas jurisdiction to review petitioner's claim. According to the INS, both the plain language of § 1252(g)[2] and the Supreme Court's decision in

---

[2] 8 U.S.C. § 1252(g) provides:
Exclusive Jurisdiction.
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) ("*AADC*") clearly foreclose any judicial review of the Attorney General's decision to execute petitioner's removal order. The INS also contends that petitioner's claim fails to present habeas issues because petitioner is not challenging the legality of his detention or seeking release from custody. Rather, the Magistrate Judge recommends that injunctive relief be entered against the Attorney General which, the INS contends, is not the function of a habeas petition. For the reasons that follow, the Court rejects both of the INS's arguments.

First, the Magistrate Judge properly relied on *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), to conclude that § 1252(g) does not bar petitioner from seeking habeas corpus relief under § 2241. In *St. Cyr*, the Supreme Court held that the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") did not eliminate federal habeas review under § 2241. *Id.* at 2287. Although *St. Cyr* did not directly address § 1252(g), *id.* at 2285 n.34, the Court agrees with the Magistrate Judge that the same principles applied by the Court in *St. Cyr* apply with equal force here. As with the three IIRIRA sections reviewed in *St. Cyr*, § 1252(g) does not expressly mention habeas or § 2241 and it should not be understood to eliminate such review by implication. Moreover, serious constitutional problems would arise if § 1252(g) were interpreted to foreclose habeas review. *Id.* at 2282 ("a serious Suspension Clause issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power

---

any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

[to issue the writ of habeas corpus] from federal judges and provided no adequate substitute for its exercise").

The Supreme Court's decision in *AADC* does not dictate a different result. In *AADC*, the Supreme Court held that § 1252(g) deprives federal courts of jurisdiction over actions challenging three discrete actions or decisions of the Attorney General, including decisions relating to the execution of removal orders. 525 U.S. at 492. But as petitioner argued below and as the Magistrate Judge and this Court agree, *AADC* is not a habeas case. Consequently, *St. Cyr*, not *AADC*, governs the resolution of this issue and compels the conclusion that the Court may properly entertain petitioner's habeas claim. *Carranza v. INS*, No. 00-2365, 2002 WL 47139, at *6 (1st Cir. Jan. 17, 2002) ("In light of *St. Cyr*, INS's principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation – is a dead letter."); *Gerbier v. Holmes*, 280 F.3d 297, 302 (3d Cir. 2002) (district court has habeas jurisdiction in light of *St. Cyr*).

The Court also finds that the remedy under the federal habeas laws is broad enough and flexible enough to provide the relief sought in this case. In *St. Cyr*, for instance, the habeas petitioner was not seeking release from custody *per se* but rather was seeking an order compelling the INS to consider whether he should be granted a discretionary waiver of removal. 121 S. Ct. at 2278. In granting the habeas petition, the Supreme Court did not release the petitioner from custody. Rather, it merely directed the INS to consider whether petitioner should be granted a waiver. Likewise, in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), the Eighth Circuit granted habeas relief in the form of an order directing the Federal Bureau of Prisons to consider whether petitioner should be allowed early release under 18 U.S.C. § 3621(e)(2)(B). *Id.* at 1081. *See also Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998) (granting writ of habeas corpus

ordering availability of discretionary relief in deportation proceedings); *Henderson v. INS*, 157 F.3d 106, 117-22 (2d Cir. 1998).

Moreover, petitioner here raises a pure question of law – whether it is legal for the INS to leave petitioner in Somalia without first obtaining some type of acceptance from a Somali governmental authority. As the Supreme Court noted in *St. Cyr*, habeas proceedings are routinely used to answer such purely legal issues. 121 S. Ct. at 2283 ("In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws."); *Henderson*, 157 F.3d at 119 n.9 (habeas jurisdiction extends to review of the Attorney General's "interpretation of the immigration laws"). Indeed, as discussed above, "a construction of [§ 1252(g)] that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." *St. Cyr*, 121 S. Ct. at 2279.

For the foregoing reasons, the Court adopts the Magistrate Judge's conclusion that "[§ 1252(g)] does not bar federal courts from entertaining habeas corpus petitions brought by criminal aliens who are attempting to challenge removal proceedings on legal or constitutional grounds." Report and Recommendation at 12. Accordingly, the government's motion to dismiss for lack of jurisdiction is denied.

II. Merits of Petitioner's Claim

The INS next argues that the report and recommendation's conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) requires some unspecified consent from Somalia prior to removal that Somalia is willing to accept petitioner is erroneous and contradicts the plain language of the statute. According to the INS, subclauses (i) through (vi) of § 1231(b)(2)(E) do not require that the receiving country be willing to accept the alien.

Section 1231(b)(2) establishes a three-step process for determining where a removable alien should be sent after a final removal order has been entered against him. In the first step, the alien may designate a country to which he wants to be sent. 8 U.S.C. § 1231(b)(2)(A). This request will be granted unless, for instance, the government of the country designated by the alien is not willing to accept him into the country. *Id.* § 1231(b)(2)(B) and (C). If the process cannot be completed at step one, the INS at step two is directed to send the alien to the country of which he is a citizen – provided that the country is willing to accept him. The statute reads as follows:

> If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country–
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.

8 U.S.C. § 1231(b)(2)(D). Step three then designates additional removal countries should the INS be unsuccessful in removing the alien at steps one and two. That section provides, in its entirety:

> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) the country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) the Country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E). The parties agree that petitioner's removal must be determined at step three of the selection process since petitioner did not designate a country in a timely fashion and because the "government of the country" of which petitioner is a "citizen," has not informed the INS that it will accept petitioner into the country. In this case, the reason the INS has not received acceptance is because Somalia presently lacks a functioning central government. The Magistrate Judge thus properly turned his attention to § 1231(b)(2)(E).

Upon review of the statutory provisions discussed above, the Magistrate Judge concluded that the acceptance requirement included in step two of the country selection process would be rendered meaningless if the INS in step

three could send an alien to the country in which he was born without obtaining that country's consent. The Magistrate Judge noted that a removable alien will almost invariably be a "subject, national or citizen" of the country in which he was born. As a result, the acceptance requirement of § 1231(b)(2)(D) is easily circumvented by § 1231(b)(2)(E)(iv) if the latter clause is read not to require acceptance. Therefore, in order to render meaningful force to all the portions of the statute, the Magistrate Judge concluded that the acceptance requirement listed in the seventh clause of step three, § 1231(b)(2)(E)(vii), was meant to apply to all the clauses listed in § 1231(b)(2)(E), including § 1231(b)(2)(E)(iv).

The Court concurs with the reasoning and conclusion of the Magistrate Judge. It is well established that when interpreting a statute, a court must seek to adopt a construction that gives effect to all its provisions. *Foulk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001) (rejecting interpretation that would render portion of the statute meaningless); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (rejecting interpretation of statute that would render element of the statute repetitive and meaningless); *McNely v. Ocala Star Banner Corp.*, 99 F.3d 1068, 1075 (11th Cir. 1996) (courts should avoid interpretations in which a literal interpretation of a statute produces absurd results). In addition, relevant case law interpreting 8 U.S.C. § 1253(a), the statutory predecessor of § 1231(b)(2), supports the Magistrate Judge's statutory construction. *United States ex rel. Tom Man v. Murff*, 246 F.2d 926 (2d Cir. 1959); *Lu v. Rogers*, 164 F. Supp. 320, 321 (D.D.C. 1958); *United States ex rel. Wong Kan Wong v. Esperdy*, 197 F. Supp. 914, 917 (S.D.N.Y. 1961); *Hom Sin v. Esperdy*, 209 F. Supp. 3, 4 (S.D.N.Y. 1962). In *Tom Man*, the leading case on this issue, the court interpreted the third step of § 1253(a) the same way as the Magistrate Judge interpreted § 1231(b)(2)(E) here:

> There remains therefore one or more of the seven subdivisions of 243(a) of which number three certainly covers him and probably several others. **However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into his territory."**

Id. at 928 (emphasis added).

In an attempt to divorce itself from the force of *Tom Man* and the Magistrate Judge's reasonable interpretation of § 1231(b)(2)(E), the INS argues that the Magistrate Judge's reliance on *Tom Man* and other cases interpreting § 1253(a) is misplaced because it ignores the "revision and reorganization" of the new statute. The Court has carefully reviewed both statutes but finds no meaningful distinction between the two statutes. Aside from the introduction of subheadings into the statute's text, the language in the old statute, as the government itself concedes, contains the same or similar language that is found in § 1231(b)(2). Accordingly, the holdings in *Tom Man* and similar cases are on all fours with the interpretation of the statute in this case.

In interpreting the statute as he did, the Magistrate Judge also pointed out that in fifty pages of briefing, the government "has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him." Report and Recommendation at 18 (emphasis in original). Now for the first time, the INS points to a Board of Immigration Appeals decision interpreting § 1253(a) in support of its argument that acceptance from the receiving country is not required to remove an alien pursuant to § 1231(b)(2)(E)(iv). *Matter of Niesel*, A-12281979, 1962 WL 12904 (BIA Aug. 10, 1962) (concluding that "[w]hen designating a country in step three as a place of deportation, there is no requirement that preliminary inquiry be addressed to the country to which

deportation is ordered (other than perhaps the seventh country in the list – a country which is willing to accept the alien into its territory)"). The INS argues that the Court should extend deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), to the BIA's interpretation of § 1253(a).

In *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the Supreme Court held that the principles of *Chevron* generally apply to the statutory scheme set out in the INA. *Id.* at 424. However, under *Chevron*, a court only defers "to agency interpretations of statutes, that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 121 S. Ct. at 2290, n.45 (quoting *Chevron*, 467 U.S. at 543). In this case, the Court finds that Congress expressed its intent clearly in § 1231(b)(2) that acceptance is required by the receiving country and that this requirement applies to all three steps of the removal process, including all the clauses listed in § 1231(b)(2)(E). Accordingly, having found no ambiguity in the statute, under *Chevron*, the Court need not defer to the BIA's 1962 interpretation. *Valansi v. Ashcroft*, 278 F.3d 203, 208-14 (3d Cir. 2002) (court did not defer to the BIA's interpretation of 18 U.S.C. § 656 because statutory language has a clear meaning). The government's objections to the Magistrate Judge's interpretation of § 1231(b)(2)(E) are thus overruled.

III. Political Question

In the final part of its objections, the INS argues for the first time that the Attorney General's decision to execute petitioner's removal order presents a nonjusticiable political question committed to the executive branch of government. Specifically, the INS claims that the determination of what constitutes "acceptance" under § 1231(b)(2) is a determination clearly committed to and best answered by the political branches of government and therefore is beyond the institutional competency of the judiciary.

Clearly, an affirmative agreement between two governments that have some level of diplomatic relations would constitute acceptance under the statute. Ideally, this would be the situation in all cases. The more difficult question arises where either there are no diplomatic relations or there exists no functioning central government in the receiving country. Whether the Attorney General can find acceptance in those circumstances is a difficult question but one that the Court need not address in this case because the INS has conceded there is no acceptance. Throughout fifty pages of briefing to the Magistrate Judge, the INS admitted that there was no "acceptance" of the petitioner from a functioning government in Somalia. Rather, it argued that acceptance was not required by the congressional statute authorizing removal, § 1231(b)(2)(E). Because of this concession, the Court will not now entertain the INS's claim that the Court's ability to define what is or is not "acceptance" under § 1231(b)(2) is a question best answered by the executive branch of government.

While a formal written "acceptance" executed by two countries who have diplomatic relations is surely the preferred form of acceptance, other forms of acceptance based on custom and practice showing mutual agreement between two countries may also be sufficient under the statute. It is difficult for the Court to see how the INS's apparent current practice of dropping off an alien in a territory with no functioning government complies with the statute. In essence, "acceptance" occurs under this policy when no one returns the deported alien. The silence of a non-functioning government in a lawless territory – with grave risks to the deported alien – simply cannot constitute "acceptance" under § 1231(b)(2).

The Court overrules the INS's objections and adopts the report and recommendation of the Magistrate Judge.

ORDER

Based on the foregoing, the submissions of the parties, and all of the files, records, and proceedings herein, the Court **OVERRULES** respondent's objections [Docket No. 22] and **ADOPTS** the Report and Recommendation of the Magistrate Judge [Docket No. 18]. Accordingly, **IT IS HEREBY ORDERED** that:

1. Respondent's Motion to Dismiss [Docket No. 6] is **DENIED**.

2. Petitioner's application for a writ of habeas corpus [Docket No. 1] is **GRANTED**.

3. Respondent is ordered not to remove Petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him and upon further order of this Court.

DATED: March 31, 2002

at Minneapolis, Minnesota.

/s/

JOHN R. TUNHEIM

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2324

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Melloy would grant the petition for rehearing en banc.

Judge McMillian and Judge Murphy did not participate in the consideration or decision of this matter.

(5128-010199)

August 6, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2324

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

Appellee Jama's motion to recall the mandate and to stay the mandate pending filing of a petition for writ of certiorari in the Supreme Court has been considered by the court and is denied.

August 28, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit